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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/817,303	04/02/2004	Joseph E. Owensby	031456/271433	1854
826	7590	11/13/2007	EXAMINER	
ALSTON & BIRD LLP BANK OF AMERICA PLAZA 101 SOUTH TRYON STREET, SUITE 4000 CHARLOTTE, NC 28280-4000			LEFF, STEVEN N	
		ART UNIT	PAPER NUMBER	
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)
	10/817,303	OWENSBY, JOSEPH E.
	Examiner	Art Unit
	Steven Leff	1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on 31 August 2007.
- 2a) This action is FINAL. 2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 1-6-14 and 20-27 is/are pending in the application.
 - 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) Claim(s) _____ is/are allowed.
- 6) Claim(s) 1, 6-14, and 20-27 is/are rejected.
- 7) Claim(s) _____ is/are objected to.
- 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 - a) All b) Some * c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) Notice of Informal Patent Application
- 6) Other: _____

DETAILED ACTION

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

- Claims 1, 6-14, and 20-27 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.
 - With respect to claim 1, the phrase "a flat bottom having an undulating profile" is rejected as it is unclear as to what is encompassed by the phrase due to the fact that the definition of flat is completely horizontal, without undulations.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

- Claims 1, 7-9, 11-12 and 26 are rejected under 35 U.S.C. 102(b) as being anticipated by Nahill et al. (6112925).

With respect to claim 1, 7-9, 12 and 26, Nahill et al. teach a container suitable for holding perishable food items. More specifically, Nahill et al. teach a tubular body portion (fig. 5 hand annotated) formed of molded thermoplastic polymer (col. 8 line 14+) having an arcuate top (fig. 5 hand annotated), two ends (fig. 5 hand annotated), and a flat bottom having an undulating profile at each side forming a trough (fig. 6 hand annotated), said tubular body portion having a cross-section suitable for holding a perishable food item (col. 1 line 37+), wherein at least a portion of the tubular body portion is transparent (col. 9 line 54+), and where one end of said body portion is closed (fig. 6 hand annotated), and the other end of the body portion has an open mouth which is adapted to be sealed (fig. 6 hand annotated).

Nahill et al. continue by teaching an end cap for sealing the open mouth (col. 5 line 43) with screw threads (col. 5 line 43), where the screw threads provide a friction fit, and that the container comprises a lip projecting radially from the periphery of the mouth opening (fig. 6 hand annotated ref. #504). Nahill et al further teach that the tubular body portion defines outwardly sloping sides (fig. 5) and that the body is opaque (col. 9 line 56+).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
 2. Ascertaining the differences between the prior art and the claims at issue.
 3. Resolving the level of ordinary skill in the pertinent art.
 4. Considering objective evidence present in the application indicating obviousness or nonobviousness.
- Claims 1, 6, 12-14, 20-25 and 27 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ahern et al. (Des 375873) in view of Garwood (5514392).

With respect to claims 11, 6, 12-14, 20-25 and 27, Ahern et al. teach a container suitable for holding perishable food items (title). More specifically, Ahern et al. teach a tubular body portion (fig. 3 hand annotated) having an arcuate top (fig. 3 hand annotated), two ends (fig. 1 hand annotated), and a flat bottom having an undulating profile at each side forming a trough (fig. 3 hand annotated), said tubular body portion having a cross-section suitable for holding a perishable food item (title), and where one end of said body portion is closed (fig. 1 hand annotated), and the other end of the body portion has an open mouth which is adapted to be sealed (fig. 1 hand annotated).

Ahern et al. continue by teaching that the container comprises a lip projecting radially from the periphery of the mouth opening (fig. 1 hand annotated) and that the tubular body portion defines outwardly sloping sides (fig. 3). It is noted that although Ahern et al. depicts the container in an upright fashion, the container of Ahern et al. is taken with respect to the hand annotated figures.

However Ahern et al. is silent with respect to the container being a molded thermoplastic polymer, that at least a portion of the tubular body portion is transparent, that a heat sealable film is used for sealing, that the food item is specifically fresh red meat, that the interior of the body portion is coated with an anti-fogging agent, that the atmosphere of the container is manipulated to increase the oxygen content thereof, and that the meat is disposed on the flat bottom of the container such that a capacity of the container is only partially filled with the meat so the meat is recessed from the arcuate top, where the meat is specifically between 50% and 75% of the capacity of the container.

Garwood teaches a container being a molded thermoplastic polymer (col. 4 line 14+), that at least a portion of the tubular body portion is transparent (col. 4 line 14), that a heat sealable film is used for sealing (col. 6 line 65+), that the food item is specifically fresh red meat (col. 3 line 26) that the interior of the body portion is coated with an anti-fogging agent (col. 3 line 32+), that the atmosphere of the container is manipulated to increase the oxygen content thereof (col. 4 line 7+), and that the meat is disposed on the flat bottom of the container such that a capacity of the container is only partially filled with the meat so the meat is recessed from the arcuate top (col. 4 line 9+), where the meat is specifically between 50% and 75% of the capacity of the container (col. 4 line 9+).

Therefore although Ahern et al. is silent with respect to the container being made of a molded thermoplastic polymer, one of ordinary skill in the art would have been motivated to combine the teachings of Ahern et al. and Garwood, since Ahern et al. provides all of the structural limitations taught by the applicant, where it is further noted that in order to provide the shape of the container as taught by Ahern et al. the container would be molded to provide the specific structure and since Garwood does specifically teach that the container is made of a molded thermoplastic polymer (col. 2 line 10+) thereby providing a relatively impermeable material which has maintains a specific shape (col. 3 line 25).

Thus it would have been obvious to one of ordinary skill in the art at the time of the invention by the applicant to have taught the container being made of a molded thermoplastic polymer since both Ahern et al. and Garwood teach food containers, since Ahern et al. teaches a specific design, and since Garwood does specifically teach the advantage of using a molded thermoplastic polymer for its art recognized and applicant's intended purpose of providing a relatively impermeable material which has maintains a specific shape as is taught by Garwood (col. 3 line 25).

Therefore although Ahern et al. is silent with respect to a heat sealable film being used for sealing, one of ordinary skill in the art would have been motivated to combine the teachings of Ahern et al. and Garwood et al., since Ahern et al. provides all of the structural limitations taught by the applicant, with respect to a food container, since Ahern et al. teaches an open end (fig. 1), where it is a known desirable feature to provide a closure for food containers, and since Garwood does specifically teach that the container is sealed with a heat sealable (col. 2 line 4+) for its art recognized and applicant's intended purpose of maintaining the freshness of perishable foods (col. 3 line 22+)

Thus it would have been obvious to one of ordinary skill in the art at the time of the invention by the applicant to have taught that a heat sealable film is used for sealing since both Ahern et al. and Garwood teach food containers, since Ahern et al. teaches an open end (fig. 1), where it is a known desirable feature to provide a closure for food containers, and since Garwood does specifically teach the advantage of sealing the container with a heat sealable (col. 2 line 4+) thereby providing a container which increases the shelf life of the of perishable foods (col. 3 line 22+) since the product remains "fresh" for a longer period of time due to the container being sealed from the ambient environment thus ultimately increasing sales as the perishable food has an increased shelf-life.

It would have further been obvious to one of ordinary skill in the art at the time of the invention by the applicant to have taught that at least a portion of the tubular body portion is transparent, since both Ahern et al. and Garwood teach food containers, since Ahern et al. teach all of the structural limitations of the container (fig. 1), where it is a known desirable feature to provide a transparent food container, as is taught by Garwood

(col. 2 line 19+) in order to provide a container which allows the contents thereof to be viewed by the consumer prior to purchasing.

It would have further been obvious to one of ordinary skill in the art at the time of the invention by the applicant to have taught that the food item is specifically fresh red meat, since both Ahern et al. and Garwood teach food containers, since Ahern et al. teach all of the structural limitations of the container (fig. 1), where it is a known desirable feature to provide a fresh red meat container, as is taught by Garwood (col. 3 line 23+) in order to maintain the freshness of perishable foods specifically fresh red meat (col. 3 line 23+), where MPEP 2144.07 states that the selection of a specific food based on its suitability for its intended use supports a *prima facie* obviousness determination.

Further, although Ahern et al. is silent with respect to teaching that the atmosphere of the container is manipulated to increase the oxygen content thereof, Ahern et al. does teach a food container (title) and where Garwood does specifically teach that the atmosphere of the container is manipulated to increase the oxygen content thereof (col. 4 line 1+), one of ordinary skill in the art at the time of the invention by the applicant would have been motivated to combine the teachings of Ahern et al. and Garwood in order to provide a container for its art recognized and applicant's intended purpose of increasing the shelf of red meat (col. 1 line 20+).

Thus it would have been obvious to one of ordinary skill in the art at the time of the invention by the applicant to teach that the atmosphere of the container is manipulated to increase the oxygen content thereof since both Ahern et al. and Garwood teach the general practice of providing a food container, and since Garwood teaches that the atmosphere of the container is manipulated to increase the oxygen content thereof for its art recognized and applicant's intended purpose of increasing the shelf of red meat, thereby increasing profits since the meat is more visually appealing to the consumer (col. 1 line 20+).

It is further noted that in order to increase the appeal of the fresh red meat within the container, the consumer must be able to see the meat when stored in a cold climate where the thermoplastic may "fog up". Therefore although Ahern et al. is silent with respect to providing an anti-fogging coating, Garwood does specifically teach providing an anti-fogging coating (col. 3 line 32), one of ordinary skill in the art would have been motivated to combine the teachings of Ahern et al. and Garwood due to the fact that the

anti-fogging coating would ensure that the meat product within the container was visible to the consumer.

Thus it would have been obvious to one of ordinary skill in the art at the time of the invention by applicant to teach the application of an anti-fogging agent since the anti-fogging agent would increase the ability of the consumer to see the product, thereby achieving the purpose of manipulating the atmosphere within the container, which is to increase the sales due to the fact that the meat looks fresh longer and the consumer is able to see the meat through the container without fogging due to the refrigerated atmosphere and the formation of condensation on the interior of the packaging.

Regarding that the capacity of the container is only partially filled with the meat so the meat is recessed from the arcuate top, where the meat is specifically between 50% and 75% of the capacity of the container, although Ahern et al. is silent with respect to this limitation, Ahern et al. does teach a food container, where Garwood does teach of the container is only partially filled with the meat so the meat is recessed from the arcuate top (col. 4 line 1) for its art recognized and applicant's intended purpose of providing a space between the arcuate top and the meat product since the gas in the space is provided in order to increase the keeping qualities of the meat (col. 4 line 1+). Therefore one of ordinary skill in the art at the time of the invention by the applicant would have been motivated to combine the teachings of Ahern et al. and Garwood in order to provide a container for its art recognized and applicant's intended purpose of increasing the shelf of red meat due to the space between the top and the food itself.

It would have thus been obvious to one of ordinary skill in the art at the time of the invention by the applicant to teach that the meat is disposed on the flat bottom of the container such that a capacity of the capacity of the container is only partially filled with the meat so the meat is recessed from the arcuate top, and that the meat is specifically between 50% and 75% of the capacity of the container, since Ahern et al. does teach a food container, where the bottom of the container is dependant upon the size of the meat and its placement within the container, and where Garwood does teach that the container is only partially filled with the meat so the meat is recessed from the arcuate top (col. 4 line 1) for its art recognized and applicant's intended purpose of increasing the shelf of red meat, where the shelf life of the meat is increased due to the gas which is in the space between the top and the meat, as is taught specifically by Garwood (col. 4 line 1+)

thereby increasing the profits since the meat is more visually appealing to the consumer for a longer duration of shelf time.

- Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over Ahern et al. (Des 375873) in view of Garwood (3480197) and in further view of Jarvis (4112124).

Ahern et al. and Garwood are taken as above, however both are silent with respect to the container having indica, and that the food item only partially fills the container.

With respect to claims 10, 11, and 22-24, Jarvis teaches that the container has indica (fig. 6 col. 11 line 64). Therefore although neither Ahern et al. nor Garwood teach that the container has indicia, both Ahern et al. and Garwood teach a meat product in a container, and where Jarvis does specifically teach that the container has indicia (fig. 6 col. 11 line 64) one of ordinary skill in the art at the time of the invention by the applicant would have been motivated to combine the teachings of Ahern et al., Garwood and Jarvis and taught that the container has indicia, for its art recognized and applicant's intended purpose of increasing the visual appearance of the container.

Thus it would have been obvious to one of ordinary skill in the art to teach that the container has indicia, in order to increase the containers appeal to the consumer since its more visually appealing thereby increasing overall sales. Further MPEP 2144.04 I states that "matters relating to ornamentation only which have no mechanical function cannot be relied upon to patentably distinguish the claimed invention from the prior art.".

Response to Arguments

Applicant's arguments with respect to claim 1, 6-14, and 20-27 have been considered but are moot in view of the new ground(s) of rejection.

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Steven Leff whose telephone number is (571) 272-6527. The examiner can normally be reached on Mon-Fri 8:30 - 5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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11/8/07

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11/8/07